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ACCESS DENIED: PROHIBITING HOMESCHOOLED STUDENTS FROM PARTICIPATING IN PUBLIC-SCHOOL ATHLETICS AND ACTIVITIES

INTRODUCTION

In 1992, parents home schooled an estimated 300,000 students.[1] Today, estimates place the number of homeschoolers at nearly 1.5 million with the number rapidly increasing.[2] Homeschooling is not a new phenomenon in the American educational system.[3] Over the last two decades, the number of parents choosing to educate their children at home has increased exponentially.[4] While continuing to call for compulsory school attendance, state legislatures have uniformly recognized homeschooling as an acceptable alternative to both public and private education.[5]

Although homeschooling is on the rise, some homeschooled students have found that they lack several benefits of public education.[6] An estimated eighty-one percent of those educating students at home want to enroll their students in extracurricular activities at local public schools.[7] Yet many homeschooled students have met resistance when attempting to exercise their statutory rights to access public-school events and activities.[8]

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1. *See* David Guterson, *No Longer a Fringe Movement*, NEWSWEEK, Oct. 5, 1998, at 71.

2. *See* Barbara Kantrowitz & Pat Wingert, *Learning at Home: Does it Pass the Test?*, NEWSWEEK, Oct. 5, 1998, at 66; *see also* National Home Education Research Institute (visited Oct. 11, 1998) <http://www.nhrei.org>.

3. *See* Eugene C. Bjorklun, Ed.D., Commentary, *Home-Schooled Students: Access to Public School Extracurricular Activities*, 109 EDUC. L. REP. 1, 1 (1996).

4. *See* David W. Fuller, Comment and Note, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599, 1600 (1998).

5. *See id.*

6. *See id.* at 1619.

7. *See* Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home-schools and Public Schools*, 74 N.C. L. REV. 1913, 1915 (1996). Lukasik also notes that 76 percent of these educators would like their students to opt in to public or private school academic courses on a part-time basis. *See id.*

8. *See* Fuller, *supra* note 4, at 1600.

Although some states have enacted legislation guaranteeing homeschoolers' rights to participate in public-school athletics and activities, many states balk at the suggestion that homeschoolers should be free to determine how and when they can take part in public-school activities.[9] Further, some states have expressly denied homeschoolers any right to access public-school activities.[10] These states claim that once parents choose an educational path contrary to a statutory right to full-time public education, they may not then disrupt the public education system by attempting to participate only in public-school activities that they themselves cannot provide adequately.[11]

This Note analyzes the issues presented by homeschooled students who seek access to public educational activities on an individual, ad hoc basis. Part I examines the history of homeschooling in the United States and the growing trend of parents removing their children from what they believe to be an inadequate or improper educational system. Part II focuses on state statutes and regulations governing participation in public-school athletics and activities. Part III considers whether homeschoolers should have the right to participate in public-school activities from both a federal and state constitutional perspective, as well as a state statutory and regulatory perspective. Finally, Part IV discusses the importance of fashioning a uniform national resolution of this issue so that parents contemplating homeschooling will make informed decisions and will understand the rights they potentially waive by opting out of public education. As homeschooling becomes more common in America, more parents and students will be disappointed to find that the public schools are not available to fill the social, academic, and competitive gaps that homeschooling cannot provide.

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9. *See id.*

10. *See* Swanson v. Guthrie Indep. Sch. Dist., 942 F. Supp. 511, 514-15 (W.D. Okla. 1996), *aff'd*, 135 F.3d 694 (10th Cir. 1998) (stating that Oklahoma law did not create a property right for homeschoolers once they made the decision to opt out of public school).

11. *See generally* Jens Preston Nielson, *Excessive Judicial Scrutiny of School Board Rules in* Kapstein v. Conrad School District, 31 CREIGHTON L. REV. 1301, 1302 (1998) (noting that students opting out of the local public-school system may not have the same right to access public-school athletics and activities as students enrolled in public schools).

I. THE RISE OF HOMESCHOOLING: FROM SIDE-SHOW TO MAIN EVENT

Commentators estimate that the number of parents choosing to homeschool their children has increased five-fold in the past decade.[12] What many once called a religious "fringe" movement today has become mainstream.[13]

All fifty states recognize that parents have a constitutional right to direct their children's education.[14] The right is not absolute, however.[15] In general, states retain a supervisory interest in homeschooled children to ensure that these children are properly educated.[16] Thirty-seven states have codified homeschooling standards.[17] Roughly half of these states require some type of periodic assessment testing for these students, and the others require minimum core curriculum standards.[18]

Parents choose to homeschool their children for many reasons.[19] Often, a desire to educate children according to family religious beliefs leads parents to shun the public schools, where the law strictly prohibits religious entanglements.[20] Other motivations may include general dissatisfaction with the local curriculum, the presence of disruptive behavior in schools, and parents' need to spend more time interacting with their

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12. *See* Kantrowitz & Wingert, *supra* note 2, at 66.

13. *See id.*

14. *See* Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 536 n.1 (1925); Kantrowitz & Wingert, *supra* note 2, at 66.

15. *See* Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699 (10th Cir. 1998), *aff'g* 942 F. Supp. 511 (W.D. Okla. 1996).

16. *See id.* (explaining that courts have allowed school systems to monitor homeschooled students' progress by mandating periodic standardized testing to assess the content and quality of these students' home education); Murphy v. Arkansas, 852 F.2d 1039, 1043 (8th Cir. 1988); *see also* State v. DeLaBruere, 154 Vt. 237 (1990) (stating that reasonable state regulations do not infringe on the right to homeschool); *In re* Charles, 399 Mass. 324 (1987) (same).

17. *See* Kantrowitz & Wingert, *supra* note 2, at 67.

18. *See id.*

19. *See* Snyder v. Charlotte Pub. Sch. Dist., 365 N.W.2d 151, 159 (Mich. 1985) (noting that parents choose not to send their children to public schools because of education concerns, discipline problems, religious motivations, and ethical considerations); Kantrowitz & Wingert, *supra* note 2, at 66 (commenting that parents may desire to be closer to their children; may need to facilitate special educational needs of gifted, learning disabled, or emotionally challenged children; or may wish to remove their children from potential harms from drugs, sex, or violence).

20. *See* Fuller, *supra* note 4, at 1605.

children.[21] Many times, a combination of these factors prompts the choice to remove a child from the public education system.[22]

In its only decision addressing parents' rights to homeschool their children, the United States Supreme Court held in *Wisconsin v. Yoder*[23] that a state law making public-school education compulsory until age sixteen was unconstitutional as applied to members of the Old Amish religion.[24] Since *Yoder*, courts have consistently acknowledged parents' constitutional right to homeschool children, especially when the right is asserted for religious reasons.[25]

Today, society accepts homeschooling as a reasonable alternative to public schools in part because of the voluminous educational resources available to parents, such as special educational organizations, educational programs, and computer- and Internet-based resources.[26] Despite the vast array of educational materials available to homeschooling parents, commentators remain concerned about educational and social gaps that parents may be unable to provide in the homeschool setting.[27] Educational software and the Internet cannot meet every student's educational and social needs.[28] As parents have realized that they are unable to provide the educational tools available in public schools, they have returned to the public schools for help.[29]

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21. *See id.* at 1606.
22. *See id.*
23. 406 U.S. 205 (1972).
24. *See id.* at 215, 234-35.
25. *See* Fuller, *supra* note 4, at 1611.
26. *See* Kantrowitz & Wingert, *supra* note 2, at 66-67; *see generally* Guterson, *supra* note 1, at 71 (asserting that homeschooling is no longer seen as a fringe movement adopted by "right-wing religious zealot[s]" or "left-wing, libertarian eccentric[s]").
27. *See* Kantrowitz & Wingert, *supra* note 2, at 67 (commenting that critics are concerned that parents cannot provide a complete education or adequate socialization in the home).
28. *See id.*
29. *See id.* at 68; Fuller, *supra* note 4, at 1600 (noting that homeschool parents recognize that a formal school setting provides unique benefits and have sought access to these benefits from local public schools).

II. NO STAY, NO PLAY: RULES GOVERNING PARTICIPATION IN PUBLIC- SCHOOL ACTIVITIES

In most jurisdictions, local school boards or school athletic associations set rules for student participation in school-sponsored activities and athletics.[30] The fact that public-school funding is generally directly proportional to the number of full-time students enrolled justifies such policies.[31] Public-school districts generally receive their funding from local property taxes, though other state revenues may increase the subsidy.[32] School districts must justify their financial needs to state funding agencies on a regular basis.[33] States base these funding mechanisms on the general assumption that students enroll in local public schools on a full-time basis.[34] School authorities not only allocate funding, but they also prescribe eligibility requirements for extracurricular activities.[35] Only when an administrative board policy is arbitrary and unjustified will the courts intervene to strike down an offending rule.[36]

Currently, thirteen states provide some statutory impetus for homeschoolers' participation in public-school programs, athletics, or activities.[37] Many of these statutes leave

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30. *See* Johnathan Pucci Diggin, Note, *School District Policy That Restricts Participation in Extracurricular Activities to Public School Students Does Not Violate a Private School Student's Equal Protection Rights*, 8 SETON HALL J. SPORT L. 327, 327-28 (1998).

31. *See* Swanson v. Guthrie Indep. Sch. Dist., 942 F. Supp. 511, 513 (W.D. Okla. 1996), *aff'd*, 135 F.3d 694 (10th Cir. 1998) (explaining that the Oklahoma State Department of Education provides fiscal aid to schools based on the number of full-time students enrolled in each school district and that part-time students are not counted for aid purposes).

32. *See* Fuller, *supra* note 4, at 1603.

33. *See id.*

34. *See id.* at 1604.

35. *See* Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998).

36. *See* Nielson, *supra* note 11, at 1312.

37. *See* Fuller, *supra* note 4, at 1615-16; *see* ARIZ. REV. STAT ANN. § 15-802.01 (Supp. 1995) (allowing homeschooled students to participate in interscholastic activities at public schools); COLO. REV. STAT. ANN. §§ 22-33-104.6(6) (West 1995) (allowing homeschooled students to participate in interscholastic and extracurricular activities at public schools); FLA. STAT. ANN. § 323.425 (West Supp. 1996) (allowing homeschooled students to participate in curricular, extracurricular, and interscholastic activities at public schools); IDAHO CODE § 33-203 (allowing homeschooled and other nonpublic-school students to participate in nonacademic activities at public schools); ILL. COMP. STAT. ANN. 5/10-20.24 (stating that nonpublic-school students may request to enroll part-time in public schools); IOWA CODE ANN. § 281-31.5(299A) (West 1988 & Supp. 1996)

homeschoolers' rights to opt into public-school programs to the discretion of local school administrators.[38] Although the remaining states may enact similar statutes, homeschool parents and students should not rely on this possibility when invoking their right to opt out of a full-time public-school education.[39]

A. Interscholastic Athletics

In *Davis v. Massachusetts Interscholastic Athletic Ass'n*,[40] the court granted an injunction prohibiting the local school district from denying Melissa Davis the opportunity to participate on a public-school softball team.[41] The Massachusetts Interscholastic Athletic Association (MIAA) had denied her request because she was not attending school sessions and, therefore, was ineligible to play on the team.[42] Even though Melissa followed a homeschool curriculum approved by the body that regulated administration at the high school whose softball team she wanted to join, she was not considered a "member" of the

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(allowing homeschooled and other nonpublic-school students to participate in curricular or extracurricular activities at public schools); ME. REV. STAT. ANN. tit. 20-A, § 5021 (West 1993) (allowing homeschooled students to participate in academic, cocurricular, extracurricular, and special education activities at public schools); N.H. REV. STAT. ANN. § 193A:2(II) (Supp. 1995) (stating that school districts are to 'work with parents upon request' to meet legal subject requirements); N.M. STAT. ANN. §§ 195:7 & 195:8 (allowing school districts to receive funds from the state for homeschoolers to whom they provide services); N.D. CENT. CODE §§ 15-34.1 - 06 (1993 & Supp. 1995) (establishing a procedure for homeschools to submit to school districts a list of extracurricular activities and notice of intent to participate); OR. REV. STAT. § 339.460 (1995) (forcing school districts to allow homeschool students access to public-school interscholastic activities); Utah State Bd. of Educ. Reg. R277-438-4 (allowing homeschool students to participate in extracurricular activities); VA. CODE ANN. §§ 22.1-253-13:1(H) (providing state funding to school districts that allow homeschooled students to enroll part-time for 'core subjects'); Wash. Common Sch. Provisions 28A.150.350 (requiring school districts to permit enrollment of and provide ancillary services for homeschooled students enrolled part-time); Wyo. High Sch. Activities Ass'n Rules 3.1.3, 6.2.0, 6.4 (allowing homeschooled students to play on participating schools' sports teams). *See also* Fuller, *supra* note 4, at 1615 n.73.

38. *See id.*

39. *See* Fuller, *supra* note 4, at 1616 (noting that the remaining states may adopt similar statutory provisions in relation to homeschoolers' right to access public schools on a part-time, ad hoc basis; until that happens, however, homeschoolers should expect to litigate or lobby their local administrators for the opportunity).

40. No. CA942887, 1995 WL 808968 (Mass. Super. Ct. Jan. 18, 1995).

41. *See id.* at *1.

42. *See id.*

school.[43] The MIAA based its denial on MIAA rule 65, which required that a student attend classes at the school to participate in interscholastic athletics.[44]

B. Academic, Music, and Social Organizations and Events

In *Snyder v. Charlotte Public School District*,[45] the Michigan Supreme Court upheld the right of a private school student to join the band at the local district public school on a part-time basis.[46] The defendant school district argued that allowing Brenda Snyder to participate in the school band as a part-time student would deplete full-time students' "scarce resources."[47] The school district argued that if it allowed students to enroll on a part-time basis, full-time student enrollment would decline, thus decreasing the district's state funding.[48] Further, the school district argued that requiring the district to coordinate between public-schooled and private- or homeschooled students would drain valuable time and resources.[49]

Conversely, in *Thomas v. Allegany County Board of Education*,[50] the Court of Special Appeals of Maryland held that the local school board had not infringed private-school students' statutory or constitutional rights by denying them the opportunity to participate in an all-county music program.[51] The program had been open to private and public-school students in the two years prior to the board's change of policy.[52] After the policy change, the board barred three private-school students who tried out for the band and earned the highest ratings.[53] Had

43. *See id.* at *1-*2.
44. *See id.*
45. 365 N.W.2d 151 (Mich. 1985). This case involved a private-school student's attempt to join the defendant public school's band. *See id.* at 151. Though this case did not involve the rights of a homeschooled student, the court's opinion arguably can be extended to any students who reside in a local Michigan public- school district but do not attend public schools.
46. *See id.* at 151.
47. *Id.* at 154.
48. *See id.*
49. *See id.*
50. 443 A.2d 622 (Md. Ct. Spec. App. 1982).
51. *See id.* at 622.
52. *See id.* at 624.
53. *See id.*

the board not changed the policy, all three students would have been chosen to participate.[54]

III. CONSTITUTIONAL, STATUTORY, AND POLICY PROHIBITIONS: THE HURDLES TO ACCESS

Many parents are frustrated that some of the benefits available to public- school students—such as participation in athletics, playing in the band, or even going to the prom—are unavailable to homeschooled students who reside in the same school district.[55] Moreover, if gaps exist in parents' instructional capabilities, parents may be forced to forego the homeschooling option to ensure their child's access to public-school academic programs.[56] By forcing parents to abandon the homeschool option, full-time enrollment requirements place a severe burden on home educators.[57] Such requirements may compel parents to (1) risk giving a child substandard instruction if the parents lack sufficient knowledge to teach a subject, or (2) abandon the principles that prompted them to choose homeschooling. Thus far, courts generally have refused to recognize a right for part-time access to public-school athletics and activities for homeschoolers.[58] Nevertheless, parents and students maintain that the federal and state constitutions protect this right.[59]

A. The Constitutional Labyrinth: A Maze of Dead-Ends

Home educators generally advance three constitutional claims: Fourteenth Amendment Due Process Clause claims arising from denial of a claimed right to access to education,[60] Fourteenth Amendment Equal Protection Clause claims arising from alleged unequal treatment of homeschoolers and full-time public- school students,[61] and First Amendment Free Exercise

54. *See id.*
55. *See* Fuller, *supra* note 4, at 1602.
56. *See id.* at 1623.
57. *See id.*
58. *See id.* at 1602.
59. *See* Diggin, *supra* note 30, at 350 n.6.
60. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998); Boyd v. Board of Dirs. of the McGehee Sch. Dist., 612 F. Supp. 86 (E.D. Ark. 1985); Bradstreet v. Sobol, 630 N.Y.S.2d 486 (1995).
61. *See, e.g.*, Davis v. Massachusetts Interscholastic Athletic Ass'n, No. CA942887,

Clause claims arising from a claimed denial of freedom to choose a religious-based or influenced education.[62] Courts typically either find no infringement or find that states' compelling interest in effectively providing public-school education generally outweighs any infringement of homeschoolers' interests.[63]

Courts review constitutional claims under one of the following three standards:[64] strict scrutiny,[65] intermediate scrutiny,[66] or a rational relationship analysis.[67]

1. Due Process

A violation of due process occurs when an individual is deprived of a protected property or liberty interest.[68] Parents have a constitutional right to direct their children's education.[69] Courts have held that this right is limited, however, because states retain supervisory authority over the education of their young citizens.[70] "It is well[-]settled law that property interests are not created by the Constitution but must be defined by an independent source such as state law."[71] Courts have been

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1995 WL 808968 (Mass. Super. Ct. Jan. 18, 1995); *Bradstreet*, 630 N.Y.S. 2d at 487.

62. *See, e.g.*, *Swanson*, 135 F.3d at 697; Thomas v. Allegany Bd. of Educ., 443 A.2d 622 (Md. App. 1998).

63. *See* Lukasik, *supra* note 7, at 1966.

64. *See id.*; *see also* Nielson, *supra* note 11, at 1312.

65. *See* Nielson, *supra* note 11, at 1312-13. When a state action affects an individual's fundamental rights, courts will apply a strict scrutiny analysis, requiring the state to show that it had a compelling reason for the action and that the rule is narrowly tailored to achieve that particular objective. *See id.*

66. *See id.* at 1313. Under intermediate scrutiny, courts require states to show that a substantial relationship exists between the action and the important state objective for which the action was taken. *See id.*

67. *See id.* If the state action does not affect a fundamental right or constitutional provision, a court will employ the rational relationship analysis, requiring the state to show that the action taken bears a rational relationship to a constitutionally permissible, legitimate objective. *See id.*

68. *See* Bradstreet v. Sobol, 630 N.Y.S.2d 486, 487 (N.Y. Sup. Ct. 1995) (citing People v. Leonard, 62 N.Y.2d 404 (1984)).

69. *See* Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699 (10th Cir. 1998).

70. *See id.*

71. Swanson v. Guthrie Indep. Sch. Dist., 942 F. Supp. 511, 514 (W.D. Okla. 1996), *aff'd*, 135 F.3d 694 (10th Cir. 1998) (holding that even if a homeschooled student could prove that she was deprived of a property interest by being denied the right to attend public school on a part-time basis, she had nonetheless been afforded her right to due process by receiving a special hearing before the local school board where her attorneys were allowed to present evidence in support of her request).

extremely reluctant to hold that homeschooled students possess a due process property interest in part-time participation in public-school activities or athletics.[72]

The plaintiffs in *Swanson v. Guthrie Independent School District*[73] argued that the school board's policy prohibiting part-time attendance infringed parents' constitutional right to raise and educate their children.[74] After acknowledging that such a right exists "up to a point," the court noted that "parents have no right to exempt their children from certain . . . programs the parents [find] objectionable," nor do they have a right "to control each and every aspect of their children's education and oust the state's authority . . . ."[75] Although the Swansons maintained that they sought not to alter the school curriculum, but to exempt their daughter from certain required classes,[76] the court held that no constitutionally significant difference existed between attempting to exempt a child from one class or four to five classes.[77] The court found that because "[t]he right to direct one's child's education does not protect either alternative," the school board's policy did not infringe upon a protected due process right.[78]

Similarly, in *Bradstreet v. Sobol*,[79] a New York state court held that a local public school did not deny a fourteen-year-old homeschooled student a due process property interest when it barred her from participating on its sports team.[80] The court reasoned that "a 'student's interest in participating in interscholastic sports is a mere expectation,' not a property right subject to due process protection."[81]

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72. Only two courts have held that students possess a valid property interest in participating in public-school athletics. Boyd v. Board Of Dir. of the McGee Sch. Dist. No. 17, 612 F. Supp 86 (E.D. Ark. 1985); *see* Davis v. Massachusetts Interscholastic Athletic Ass'n, No. CA942887, 1995 WL 808968 (Mass. Super. Jan. 18, 1995); *see generally* Derwin L. Webb, *Home-Schools and Interscholastic Sports: Denying Participation Violates United States Constitutional Due Process and Equal Protection Rights*, 26 J.L. & EDUC. 123 (July 1997) (providing background on the issue).

73. 135 F.3d 694 (10th Cir. 1998), *aff'g* 942 F.Supp. 511 (W.D. Okla. 1996).

74. *See id.* at 699.

75. *Id.*

76. *See id.* at 700.

77. *See id.*

78. *Id.*

79. 630 N.Y.S.2d 486 (1995).

80. *See id.* at 487.

81. *Id.* at 487 (quoting Matter of Caso v. New York St. Pub. High Sch. Athletic Ass'n,

Conversely, in *Boyd v. Board of Directors of the McGehee School District*, a federal district court found that a student had a constitutional right to procedural due process[82] before the coach could dismiss him from the public- school football team for the remainder of the season.[83] The coach testified that the student, Orlando Johnson, was an exceptional athlete and had an excellent opportunity to get a college scholarship based on his athletic ability.[84] Moreover, the court found that "Johnson's continued status as a member of the McGehee High School football team during his last year was very important to Johnson's development educationally and economically in the future."[85] Johnson was a full-time student, had been a member of the football team for several seasons, and was genuinely talented enough to receive a college scholarship.[86] Consequently, the court held that Johnson possessed a valid due process property interest in his ability to play for the football team:[87] "Johnson's interest was indeed embraced in those fundamental aspects of life, liberty and property which the Federal Constitution is designed to protect and secure."[88]

2. Equal Protection

Parties challenging public-school attendance requirements often bring claims under the federal Constitution's Equal Protection Clause.[89] Because the Fourteenth Amendment guarantees "equal protection of the laws,"[90] state action that denies similarly situated persons equal protection of life, liberty, property, or pursuit of happiness violates the Constitution.[91]

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434 N.Y.S.2d 60 (1980)).

82. 612 F. Supp. 86 (E.D. Ark. 1985).

83. *See id.* The court defined procedural due process as "notice of the charge against [the student] and an opportunity to present his side of [the] controversy," before the student was ejected from the football team. *Id.* at 93.

84. *See id.*

85. *Id.*

86. *See id.*

87. *See id.*

88. *Id.*

89. *See, e.g.*, Davis v. Massachusetts Interscholastic Athletic Ass'n., No.CA942887, 1995 WL 808968 (Mass. Super. Ct. Jan. 18, 1995); *Bradstreet v. Sobol*, 630 N.Y.S.2d 486 (1995).

90. U.S. CONST. amend. XIV, § 1.

91. *See* Diggin, *supra* note 30, at 350 n.6.

The court in *Bradstreet* stated that because Charlotte Bradstreet neither belonged to a suspect classification nor advanced a fundamental rights claim, the regulation supporting the school board's decision to deny access could survive an equal protection challenge as long as the rule was rationally related to a legitimate state purpose.[92] The defendant school only allowed members of its student body to participate in school sports; its commissioner successfully argued that this policy advanced legitimate state objectives because it promoted loyalty, school spirit, student-body cohesion, academic standards, and provided role models for other students within the institution.[93] The court agreed with the commissioner, finding that "havoc may be wreaked upon the public-school system if homeschoolers are permitted to opt out of the public-school program generally and yet selectively participate in interschool athletics and then extend that ability to select courses of instruction as well."[94]

Conversely, the court in *Davis* found that the plaintiff's equal protection claim had a substantial likelihood of success on the merits. Melissa Davis filed suit after a local school board refused to allow homeschoolers access to public- school sports teams.[95] State statutes required her to meet the same educational requirements as public high school students, and the local school superintendent approved and monitored her academic program.[96] These facts persuaded the court that Melissa's homeschool sessions were academically equivalent to the public high school's; thus, Melissa was attending school sessions for all intents and purposes.[97] The court determined that it should evaluate the MIAA rule under the rational relationship test because the plaintiff did not have a fundamental right to try out for the softball team and she did not belong to a suspect group.[98] Even under minimal scrutiny, however, the court found that the classification advanced by MIAA rule 65 treated students

92. *See Bradstreet*, 630 N.Y.S.2d at 487.
93. *See id.*
94. *Id.*
95. *See Davis* 1995 WL 808968 at *2.
96. *See id.*
97. *See id.*
98. *See id.*

differently based on where they were educated.[99] Furthermore, the court found that the classification did not advance any legitimate state purpose.[100]

3. Free Exercise of Religion

The First Amendment to the U.S. Constitution guarantees citizens the right to freely exercise their religion.[101] Courts have interpreted the Free Exercise Clause to mean that governmental entities cannot "interfere with, burden, or deny the free exercise of legitimate religious beliefs"[102] unless the state action is narrowly tailored to meet a compelling government interest.[103]

In *Swanson*, the parents argued that the local school board's regulation requiring either full-time public-school attendance or homeschooling burdened the free exercise of their children's religious beliefs.[104] The Swansons contended that the court should require that the policy be narrowly tailored to achieve a compelling government interest.[105] The court held that strict scrutiny was inappropriate, however, because the policy was neutrally administered and applied to all persons who might have wanted to attend public school on a part-time basis.[106] Instead, the court applied the rational basis test and found that the policy was reasonably related to a legitimate state interest.[107] According to the court, the school district had a legitimate interest in maximizing state funding.[108] Because the state based such allocations on the number of full-time students in attendance, limiting part-time attendance was a reasonable

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99. *See id.*

100. *See id.* The court indicated that the state failed to meet its burden of showing that the regulation was rationally related to a legitimate purpose and engaged in "provid[ing] mere speculation as to its rationale" for justifying its position. *Id.* at *2 n.5.

101. *See* U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.*

102. Thomas v. Allegany County Bd. of Educ., 443 A.2d 622, 625 (Md. App. 1998).

103. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Swanson v. Guthrie Indep. Sch. Dist., 942 F. Supp. 511, 514 (W.D. Okla. 1996), *aff'd*, 135 F.3d 694 (10th Cir. 1998); *Thomas*, 443 A.2d at 625.

104. *See Swanson*, 135 F.3d at 699.

105. *See id.*

106. *See id.* at 698.

107. *See id.* at 700 n.5.

108. *See id.*

means of achieving maximum educational funding.[109] Finally, the court determined that Annie Swanson freely exercised her religious beliefs when she chose to be homeschooled according to Christian values and teachings.[110]

Similarly, the band students in *Thomas* contended that the board violated their Free Exercise Clause rights when it barred parochial students from participating in the all-county band.[111] Using the balancing test from *Wisconsin v. Yoder*,[112] the court looked at whether the restriction on private-school students' participation interfered with or burdened their rights to freely exercise their religious beliefs.[113] On the other hand, the court weighed whether the state had an interest that was strong enough to "override" the private-school students' interests.[114] It found that the restriction had minimal impact on the students' religious beliefs because it did not prevent parents from enrolling their children full-time or inhibit the students' religious practices.[115]

Moreover, the court found that the board had a strong interest in only allowing public-school students to participate in public-school programs; it stated that allowing private-schooled and homeschooled students access to public-school activities whenever they pleased would be like "opening . . . Pandora's Box."[116] Thus, the state's interest outweighed the minimal impact on the students' religious practices.[117]

The above cases demonstrate that parents cannot rely on the First or Fourteenth Amendments when they argue that homeschoolers have a constitutional right to access public-school athletics or activities if the students' primary educational venue is the home.[118]

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109. *See id.*
110. *See* Swanson v. Guthrie Indep. Sch. Dist., 942 F. Supp. 511, 516 (W.D. Okla. 1996), *aff'd*, 135 F.3d 694 (10th Cir. 1998).
111. *See* Thomas v. Allegany County Bd. of Educ., 443 A.2d 622, 625 (Md. App. 1998).
112. 406 U.S. 205 (1972).
113. *See Thomas*, 443 A.2d at 625-26.
114. *See id.*
115. *See id.* at 625.
116. *Id.* at 625-26.
117. *See id.*
118. *See*, Lukasik, *supra* note 7, at 1964-65.

B. Statutory Arguments

States have an interest in the education of their young citizens because education provides individuals with the skills to meaningfully contribute to society and the economy later in life.[119] Every state constitution reflects this interest by including provisions for public educational systems.[120] In accordance with this state constitutional authority, state legislatures have enacted laws that create governing bodies to oversee administration of local school districts.[121]

However, a local school board's statutory authority to administer the education of a state's youth is not broad enough to restrict parents and students from choosing the most effective and desirable educational path.[122] Thus, students and parents may forgo a free, public-school education in favor of a private, religious, or homeschool education.[123] Nevertheless, courts that deny homeschoolers a right to participate selectively in public-school activities often find that recognizing such a right would conflict with a school board's statutory authority to "supervise and govern the affairs of state public schools."[124]

For example, in *Swanson*, the plaintiffs asked the court to recognize a constitutional right for homeschool students to use public schools as a supplement to homeschooling, rather than as an equivalent alternative.[125] "[D]eclin[ing] to adopt Plaintiffs' strained interpretation of Oklahoma law to create a right to a free part-time public education,"[126] the court held that the state statutes governing public education clearly allowed local school boards to oversee administration and operation of

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119. *See* Nielson, *supra* note 11, at 1310. "'[E]ducation is perhaps the most important function of state and local government.'" *Id.* (quoting Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954)).

120. *See* Fuller, *supra* note 4, at 1602.

121. *See id.* at 1603. These administrative bodies, generally in the form of school boards headed by a superintendent and supported by an elected or appointed board, determine how the local systems will be run. *See id.* Administrative responsibilities include, but are not limited to, operations, curriculum, personnel, facilities, judicial hearings, and general governance. *See id.*

122. *See id.*

123. *See id.*

124. Nielson, *supra* note 11, at 1311.

125. *See* Swanson v. Guthrie Indep. Sch. Dist., 942 F. Supp. 511, 515 (W.D. Okla. 1996), *aff'd*, 135 F.3d 694 (10th Cir. 1998).

126. *Id.*

state school districts in a manner best suited to meet the needs of the student population.[127]

Similarly, in *Thomas*, the students seeking positions in the all-county band alleged that the state education code gave them the right to participate in any aspect of the public-school system.[128] The court stated that it could not accept "such a strained construction" of the statute[129] because to do so would place an unreasonable burden on the board's effective administration of public schools.[130]

In contrast, the court in *Snyder* relied on the Michigan "shared-time statutes" to uphold a homeschooler's right to participate in the local public-school band.[131] Although plaintiffs raised a Free Exercise Clause claim, the court relied on the statute to find that a nonpublic-school student's statutory right to take a band course at a public school extended to students of both secular and religious private schools.[132]

C. Policy Analysis

Requiring public schools to allow homeschooled students to participate in athletics and extracurricular activities presents both financial and administrative concerns for public boards of education.[133] Enrollment-based funding schemes often cause courts to deny access to athletics or activities to homeschooled or private-school students.[134] School boards shun part-time admission practices because laws that mandate state

127. *See id.* (citing OKLA. STAT. ANN. tit. 70, § 5-117(A)(3)(West Supp. 1995-96)).

128. *See* Thomas v. Allegany County Bd. Of Educ., 443 A.2d 622, 627 (Md. Ct. Spec. App. 1982) (discussing MD. CODE ANN. [EDUC.] § 7-101(a), which provides that "all individuals who are 5 years old or older and under 21 shall be admitted free of charge to the public schools of this State").

129. *Id.*

130. *See id.*

131. *See* Snyder v. Charlotte Pub. Sch. Dist., 365 N.W.2d 151, 153 (Mich. 1985). The court goes to great lengths to describe and define the concept of shared time. *See id.* "[S]hared time means an arrangement for pupils enrolled in nonpublic elementary or secondary schools to attend public schools for instruction in certain subjects . . . [it] is an operation whereby the public school district makes available courses in its general curriculum to both public and nonpublic school students . . . ." *Id.* at 154 (quoting Traverse City Sch. Dist. v. Attorney Gen., 384 Mich. 390, 411 n.3 (1971)).

132. *See id.* at 164.

133. *See* Lukasik, *supra* note 7, at 1966-67.

134. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 697 (10th Cir. 1998), *aff'g* 942 F.Supp. 511 (W.D. Okla. 1996).

educational funding procedures often base allocations on full-time enrollment.[135] For example, in *Swanson*, the school board defended its policy on funding grounds and stated that "[i]n the event the State Department of Education advises us that part-time students can be counted for state aid purposes, the Board will reconsider this policy."[136] Critics argue that because funding laws generally ignore homeschoolers, requiring public schools to allocate scarce fiscal resources to support homeschoolers' access to athletics and activities would provide homeschoolers with an unfair advantage—in essence, homeschoolers would receive the benefits of each educational alternative's positive features.[137]

Homeschoolers can use the converse funding-based argument to support access to public-school benefits, however; because homeschooling parents' taxes support public education, their children should reap the benefits of local schools.[138] Homeschool families receive minimal return on their tax investment in public education, perhaps only the social and economic benefits of a well-educated citizenry.[139] On the other hand, public-school

135. *See id.* at 698 n.3 (noting that the only exceptions to the full-time attendance rule were those that constituted categories of students that counted for state educational funding purposes).

136. *Id.* at 697. The board was afraid that if they granted Annie Swanson's request, the flood gates would be opened to a plethora of similar requests without any opportunity for commensurate state fiscal support. *See id.*

137. *See* Lukasik, *supra* note 7, at 1967-68 (asserting that requiring school boards to support homeschoolers in their quest to access public school on a part-time basis is tantamount to requiring schools to spend limited state educational funding on part-time students who are not considered for funding purposes; thus, these students deprive full-time students of already scarce fiscal resources). Lukasik uses the example of a homeschooler afforded access to a public-school chemistry class because his homeschool instructor lacks the knowledge and lab resources to effectively teach the subject. *See id.* If the state must allow this student to access a class at the local public school, Lukasik asks, what provisions must the school make? *See id.* If the class is offered only during the time that the homeschooler is required to study religion at home, must the school reschedule the class at the expense of some full-time students to facilitate the homeschooler's religious need? *See id.* If the class enrollment is full, is the school required to hire additional faculty to meet the homeschooler's educational needs? *See id.* Will the school be held responsible for providing transportation to and from class in the middle of the school day? *See id.* at 1966-69. Any potential financial burden placed on the public schools to support homeschoolers' access of public school programs will likely take valuable resources away from the full-time students. *See id.* at 1968.

138. *See id.* at 1627-28.

139. *See id.*

districts benefit enormously: schools receive a proportionate share of tax revenue that includes homeschool families' contributions, yet they do not have to bear the expenses of educating homeschooled children.[140] When public education administrators argue against allowing homeschoolers to participate in public-school athletics and activities, they focus on the costs involved and often ignore the costs avoided by these students' decisions to opt out of public education in the first place.[141] Courts that consider the costs associated with part-time access should also look at whether a school system saves the cost of educating an additional full-time student when a homeschooler chooses not to attend.[142]

Funding was not at issue in *Snyder*, where the school board admitted that it would receive state funding on the basis of Brenda Snyder's part-time enrollment in the local public-school band.[143] Instead, the court weighed her individual right to access against the administrative burdens on public schools.[144] "[P]ublic school administrators are unlikely to desire responsibility for the heightened administrative burdens of a school system in which children may come and go throughout the day."[145]

The court in *Snyder* found that the school board failed to show how part-time attendance would adversely affect the educational setting.[146] Instead, the court noted that a diverse student body enhanced by part-time students would "result in new perspectives to problems, stimulate the educational process, and engender respect and understanding for other students' beliefs and upbringing."[147] The court further found that because part-time students had to follow all of the administration's rules and regulations, they would have created minimal disruption.[148]

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140. *See id.*
141. *See id.* at 1628.
142. *See id.* at 1628-29.
143. *See* Snyder v. Charlotte Pub. Sch. Dist., 365 N.W.2d 151, 153 (Mich. 1985).
144. *See id.*
145. Lukasik, *supra* note 7, at 1915.
146. *See Snyder*, 365 N.W. 2d at 159.
147. *Id.*
148. *See id.*

In contrast, the court in *Kapstein v. Conrad School District*[149] upheld the school board's decision to deny Tami Kapstein's request to participate in public-school athletics.[150] School administrators argued that requiring them to ensure that homeschoolers met the same attendance and academic criteria as full-time student athletes would place an unreasonable burden on them.[151] In addition, schools would have to improve communication between school administrators and homeschoolers, provide insurance for homeschoolers participating in public-school athletic competition, maintain control of school-owned athletic equipment, and enforce training and academic standards for all students participating in school sports programs.[152] Furthermore, the integration of homeschooled "strangers" into these programs could undermine the unity and team pride of athletes who attended the same school on a daily basis.[153] The court concluded that compromising the integrity of school policy and administration could contravene the educational objectives of public school systems and prevent public-school students from fully realizing the benefits of extracurricular activities.[154]

These cases do not indicate that in all circumstances it is in the state's best interest to deny homeschoolers access to public-school programs. In some situations, the state may have a compelling interest in maximizing the educational opportunities available to homeschoolers by allowing them access to public-school programs.[155] If a homeschooler's access places no additional financial or substantive administrative burden on a local public school, then that student should have the chance to earn a college athletic scholarship or to learn to play a musical instrument.[156] If the homeschooler's participation in the public-school program will potentially benefit society over

149. 931 P.2d 1311 (Mont. 1997).
150. *See id.*
151. *See* Nielson, *supra* note 11, at 1333-34 (citing Brief for Respondent at 20, *Kapstein* (No. 96-490)).
152. *See id.* at 1334 (citing Brief for Respondent at 23, *Kapstein* (No. 96-490)).
153. *See id.*
154. *See Kapstein*, 931 P.2d. at 1317.
155. *See* Lukasik, *supra* note 7, at 1969-70 (arguing that some exceptions to the rule denying homeschoolers access to public school on a part-time basis would be acceptable).
156. *See id.*

time and causes minimal disruption, then admitting that student may benefit society.[157] In the end, allowing state authorities to use their discretion in granting homeschoolers' requests to participate in public-school activities could prove to be the best solution.[158]

CONCLUSION

Public schools that only allow full-time students to participate in extracurricular activities may substantially impede a homeschooled student's educational development.[159] However, allowing part-time attendance by homeschoolers could mitigate potential educational or social harm to some homeschooled students.[160] Indeed, access to public-school programs on a part-time basis would benefit parents, students, and society in general by promoting more complete, effective educational choices and opportunities for all students.[161]

However, judicial intervention may render state and local educational administrative entities impotent.[162] These entities' effectiveness relies in part on the notion that courts hesitate to interfere with administrative rules and regulations.[163] Weakened, inefficient school boards and administrations are less able to provide full-time students with an effective learning environment.[164]

Although states can constitutionally refuse homeschoolers access to public- school athletics or activities on a part-time basis,[165] homeschooled students and parent educators retain educational choices.[166] Moreover, parents who determine that

157. *See id.* at 1970.
158. *See id.* at 1971.
159. *See id.*
160. *See* Fuller, *supra* note 4, at 1625.
161. *See id.*
162. *See* Nielson, *supra* note 11, at 1333.
163. *See id.*
164. *See id.*
165. *See* Lukasik, *supra* note 7, at 1959.
166. *See id.*

the opportunity for their children to take part in public-school activities and athletics outweighs the impetus for homeschooling can re-enroll a homeschooler in local public schools.

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